IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

ANNE B. ZIPES, et al.,

Petitioners

vs. No. 78-1545

TRANS WORLD AIRLINES, INC.,

Respondent,

TRANS WORLD AIRLINES, INC.,

Cross-Petitioner,

vs. No. 78-1549

ANNE B. ZIPES, et al.,

Respondents,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Petitioner,

vs. No. 80-951

TRANS WORLD AIRLINES, INC., and ANNE B. ZIPES, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION BY TRANS WORLD AIRLINES, INC. TO LIMIT REVIEW IN NO. 80-951 TO ISSUE OF SENIORITY AND TREAT NOS. 78-1545 AND 78-1549 AS MOOT

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PETITION FOR CERTIORARI IN NO. 78-1545 FILED APRIL 10, 1979, IN NO. 78-1549 ON APRIL 11, 1979, AND IN NO. 80-951 ON DECEMBER 12, 1980. ALL

TABLE OF CONTENTS

	PAGE
Objects of Motion	2
Difference between Settlement and Seniority Orders	4
Interest of Union Limited to Competitive Seniority	6
Union's Contentions Against Settlement Order Apply to Seniority Order	7
Unfair Effect on Parties If Review Not Limited to Seniority Order	10
Conclusion	12
Appendix	
A. Order Approving Settlement and Dismissing Actions	1a
B. Order Awarding Seniority	3a

TABLE OF AUTHORITIES

Cases:

	PAGE
ALSSA v. *American Airlines, Inc.*, 490 F. 2d 636 (7th Cir. 1973), *cert. den.* 416 U. S. 993 (1974).	10, 11
ALSSA v. *TWA*, 630 F. 2d 1164 (7th Cir. 1980) ...	2
In re Consolidated Pretrial Proceedings in the Airlines Cases, 582 F. 2d 1142 (7th Cir. 1978) ...	2, 4
Franks v. *Bowman Transportation Co.*, 424 U. S. 747 (1976) ...	9, 10
J. Aron & Co. v. *Mississippi Shipping Co.*, 361 U. S. 115 (1959) ...	3
McArthur v. *Southern Airways*, 569 F. 2d 276 (5th Cir. 1978) ...	8
Preiser v. *Newkirk*, 422 U. S. 395, 403-4 (1975) ...	3
United Airlines, Inc. v. *Evans*, 431 U. S. 553 (1977) ...	8, 9, 10
U. S. v. *Munsingwear Inc.*, 340 U. S. 36 (1950) ...	3

Statute and Rules:

Civil Rights Act of 1964, Title VII, 78 Stat. 253, 42 USC § 2000(e), *et seq.* ...	2, 4, 8-10
Rule 23(e), Federal Rules of Civil Procedure ...	4
Rules of Supreme Court ...	2, 8

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MOTION BY TRANS WORLD AIRLINES, INC. TO LIMIT REVIEW IN NO. 80-951 TO ISSUE OF SENIORITY AND TREAT NOS. 78-1545 AND 78-1549 AS MOOT.

Objects of Motion

The grant of certiorari on March 9, 1981 in the three captioned cases,[1] then also consolidated, was without limitation of the varied issues raised by the petitions. Trans World Airlines, Inc.,[2] respondent in Nos. 80-951 and 78-1545 and petitioner in No. 78-1549, *moves the Court to limit review in No. 80-951 to the order of the district court entitled "Order Awarding Seniority"*. The limitation would preclude review of, and make final, the district court order entitled "Order Approving Settlement and Dismissing Actions". The settlement order is copied in Appendix A to this motion (p. 1a), and the seniority order in Appendix B (p. 3a). The contentions of the union petitioner in No. 80-951 against the settlement order apply also to the seniority order, as this motion explains. Thus review of the

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[1] In No. 78-1545 the plaintiffs in a class action under Title VII of the Civil Rights Act of 1964 sought reversal of a court of appeals' decision that many class members had failed to comply with a Title VII time limit, held to be jurisdictional. *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F. 2d 1142 (7th Cir. 1978)

In No. 78-1549 Trans World Airlines, Inc., defendant in the same class action, sought by a Cross-Petition, conditional on a certiorari grant in No. 78-1545, to reverse the court of appeals' holding that TWA's practice of terminating flight attendants on pregnancy during 1965-70 was unlawful sex discrimination under Title VII.

In No. 80-951 the union representing current flight attendants, an intervenor in the trial court, sought reversal of a court of appeals' decision affirming two trial court orders. One, "Order Approving Settlement and Dismissing Action", approved a settlement of the issues in Nos. 78-1545 and 78-1549. The other, "Order Awarding Seniority", granted retroactive competitive seniority to terminated employees who might be re-employed under the settlement. *ALSSA* v. *TWA*, 630 F. 2d 1164 (7th Cir. 1980)

[2] As required by Rule 28.1 of this Court, Trans World Airlines, Inc. states that it is a subsidiary of Trans World Corporation, of which Hilton International Co., Canteen Corporation, Spartan-Newfoods Corp., and Century 21 Real Estate Corporation are also subsidiaries.

seniority order alone will adequately protect the interests of the currently employed flight attendants whom the union solely represents.

If the settlement order is excluded from review in No. 80-951, the petitions in Nos. 78-1545 and 1549 would be required to be dismissed by the parties pursuant to the settlement agreement (Cert. Pet. Appendix 25a, 35a). It would then be appropriate, *and TWA so moves, that the Court treat the petitions in Nos. 78-1545 and 78-1549 as moot and direct dismissal.*[3]

This motion is prompted by the unexpected grant of all three certiorari petitions after this Court in June 1979 had held up consideration of the petitions in Nos. 78-1545 and 78-1549 pursuant to the parties' motion that they were negotiating a settlement. The parties are put in the position of arguing important time limit and sex discrimination issues under Title VII which, after years of effort, they were able to settle in June 1979. These questions affecting liability and the agreement settling them would be argued orally on the same day under the grant of the three petitions. The reasons for holding up consideration of the petitions in Nos. 78-1545 and 78-1549 continue to exist until this Court issues an order on the union's appeal from the settlement order in No. 89-951. A way out of this incongruous situation would be provided by limitation of review to the seniority order, which will also greatly simplify the review process.

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[3] When litigation is settled after certiorari has been filed, the court of appeals' judgment is vacated and the district court is directed to dismiss the case as moot. *J. Aron & Co.* v. *Mississippi Shipping Co.*, 361 U. S. 115 (1959); *U. S.* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950); *Preiser* v. *Newkirk*, 422 U.S. 403-4 (1975). Such a result would accord with the provisions of the order approving the settlement that the actions are dismissed but that the court retains jurisdiction to enforce the terms of the settlement agreement (Appendix A, this motion).

Difference Between Settlement and Seniority Orders

The crucial difference between the two orders justifies treating them differently.

The settlement agreement differentiated between the overall settlement and competitive seniority. Section III required TWA to pay $1,500,000 to each of Class A and Class B members,[4] to offer re-employment to all terminated employees, and to issue trip passes for non-returning members (Cert. Pet. Appendix 26a). After setting forth the procedure for obtaining court approval of the settlement under Rule 23(e) of the Federal Rules of Civil Procedure, the parties agreed to dismiss the cases involved on the "final order date" after approval. Section V dealt with two kinds of seniority. Subsection A gave each re-employed class member the "amount of company seniority and length of service" for the entire compensation period (*id.* 29a). Subsection B provided for retroactive competitive (also known as union or occupational) seniority (*id.* 21a, 29a). The total amount of competitive seniority, the agreement stated, "will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by TWA." The class representatives agreed to present the matters involved in the court's determination of seniority "within a reasonable time after the entry of an order approving the settlement."

Thus the settlement agreement contemplated two different decisions. One would involve the approval of the overall agreement and would go into effect on a "Final Order Date", which was defined and explained in the agreement (*id.* 25a, 35a, 36a). The decision on competitive seniority could be

[4] The main distinction between them is that Class A members, of whom there are approximately 30, were held by the court of appeals to have complied with the Title VII time limit while Class B members (approx. 400) were held not to have complied. 582 F. 2d 1142.

made at the same time or separately as indicated by the provision that the decision on seniority could be entered after the order approving the settlement.

This distinction was carried out in the two orders appealed by the union. They were entered after separate hearings on the settlement and competitive seniority. The Order Approving Settlement and Dismissing Actions (App. A, this motion) gave the class members the benefits provided by the overall settlement and ordered the actions to be dismissed. The order expressly retained jurisdiction to determine the amount of accrued and retroactive competitive seniority as provided in Section V B of the agreement. The Order Awarding Seniority (App. B, *id.*) gave each terminated flight attendant who might be later employed under the agreement the amount of competitive seniority to which she was entitled when her employment was terminated plus seniority for the period up to the date of the settlement agreement.

The settlement order will become final and ready to be complied with when it is no longer subject to review (Cert. Pet. Appendix 35a-36a). Thus, if the union had not appealed from the settlement order, the parties could have proceeded to carry it out after district court approval in November 1979 and the end of the notice of appeal period. However, since the union's appeal included the settlement order, the parties cannot proceed with the agreement until this Court enters an order affirming or refusing to review the order in No. 80-951. This Court's refusal to review the order would then permit the parties to proceed with the settlement. As explained later (pp. 7-10), the issues raised by the union against the settlement order could continue to be considered in review of the seniority order. The seniority decision of this Court would not affect the other benefits, nor the validity, of the settlement agreement.

Interest of Union Limited to Competitive Seniority

The benefits of the overall settlement do not adversely affect the currently employed flight attendants whom the union solely represents. Their interest is limited to competitive seniority. Despite the union's inclusion of the settlement approval order in its appeal, it has conceded that it had no objection to the overall settlement.

In the trial court the union was very precise in limiting its objection as intervenor to competitive seniority. Its trial court brief explained the distinction "between those portions of the settlement to which the Intervenor does *not* object and those to which the Intervenor's objections *are* directed" (emphasis not added). The brief then stated in two paragraphs[5] what was not

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[5] "The Settlement Agreement provides for payment by TWA, to the class, of three million dollars (Settlement Agreement, Page 4), an offer or reemployment (Settlement Agreement Page 5), trip passes for class members not returning to employment (Settlement Agreement, Page 11), and 'Company seniority and length of service' to which each reemployed class member 'was entitled at the date on which her employment was terminated plus Company seniority and such length of service for the entire compensation period . . .' (Settlement Agreement, Section V. A., Page 8). *As to the preceding entitlements of class members, the Union-Intervenor concededly has no standing to object and, indeed, does not object. Presently-employed flight attendants, represented by the Union, are not adversely affected by these provisions.*

"The Settlement Agreement further provides, however, that reemployed class members shall be 'restored to full occupational (Union) seniority and credit for length of service to the same extent as is provided in Section V. A. above' (Settlement Agreement, Section V. B., Page 8). The Settlement Agreement, in the latter section, provides for timely objection of any interested person (presumably including the Intervenor) as to the 'amount of seniority and credit for length of service for the compensation period.' *It is this 'full occupational (Union) seniority and credit for length of service'*, not only for the compensation period, but also that to which the class members were entitled at the date on which their respective employment was terminated, *to which the Union-Intervenor objects.*" (Emphasis added)

and what was objected to. The union there conceded that its members "are not adversely affected" by the provisions of the settlement for the payment of three million dollars by TWA, the re-employment of the terminated class members, and company seniority. It is only the provision for full competitive seniority, as determined by the district court, to which the union objected.

Similarly in this Court the union's brief in reply to opposing briefs indicates how its members' interests are limited to competitive seniority. Answering the plaintiffs' argument that an incumbent flight attendant could not be forced out of her job or required to transfer pursuant to the settlement, the union's brief contends this was not true "because of" the competitive seniority rights granted to the re-employed flight attendants (Petitioner's Reply to Briefs In Opposition, p. 3). Answering the plaintiffs' contention that the union's argument would prevent a settlement of liabilities in a Title VII case, the union replied:

> "Nonsense. It would mean only that where liability has not been proved and the Union is not a party to the settlement, the company and the plaintiffs *could not agree to grant the plaintiffs competitive seniority.*" (*id.* p. 7, emphasis added)

And the union's "Conclusion" treated competitive seniority as the sole ground of objection (*id.* p. 8). Noting the respondents' contention that certiorari should be denied "so that the settlement will not be frustrated", the union answered,

> "But settlements *which abrogate the legitimate seniority rights of incumbent employees* on behalf of individuals who have failed to prove a violation of Title VII *should be frustrated.*" (Emphasis added)

Union's Contentions Against Settlement Order Apply to Seniority Order

If the legal contentions relevant to the settlement approval order are also relevant to the seniority order, the case in this

Court would be simplified by confining review to the seniority order. At this stage, the parties do not know the "special and important reasons" (Rule 17 of this Court) that were believed to justify discretionary review. But whatever the reasons, they exist for review of the seniority order alone and do not require review of the settlement approval order.

The union's attack on the settlement order, as raised by Question 1 (p. i) and argued in Point I in the No. 80-951 petition (pp. 9-18), is jurisdictional. The union contends that the district court had no jurisdiction to approve the settlement as to the 400 (approx.) class members who, the court of appeals held in the decision before this Court in No. 78-1545, had not complied with a Title VII time limit that is a prerequisite of jurisdiction over their claims. The union's authorities for the argument are the statement in *United Airlines* v. *Evans*, 431 U. S. 553, 558 (1977), a Title VII case, that a "discriminatory act which is not made the basis for a timely charge . . . has no legal consequences"; the holding in *McArthur* v. *Southern Airways*, 569 F. 2d 276 (5th Cir. 1978), vacating a consent decree in a Title VII case for lack of jurisdiction when all plaintiffs conceded non-compliance with the time limit; and the long line of cases holding the Title VII time limit to be jurisdictional (Cert. Pet. 10-17). There are strong reasons why these decisions, which fully support the court of appeals' jurisdictional holding, do not invalidate the settlement here. For example, the settlement, when approved, will result in vacating the court of appeals' decision (see above, p. 3, footnote), which was not final when the settlement was made (and is still not final).

But more significantly for the present motion, it is evident from the union's brief that its jurisdictional argument, if legally sound, would be available to reverse the seniority order even though the settlement order was sustained by the Court's refusal to review it. The settlement agreement provided that competitive seniority would be decided by the district court

pursuant to § 706(g) of Title VII "and all other applicable provisions of law." Competitive seniority could thus have been allowed or disallowed by the district court as the law required. The current employees' interest was thus adequately protected by the right to attack the seniority order as to the 400 (approx.) class members held to have failed to comply with the jurisdictional time limit.

The union relies heavily on the holdings of *Franks* v. *Bowman Transportation Company*, 424 U. S. 747 (1976), that competitive seniority is an appropriate remedy (a) after a discriminatory act has been proved and (b) absent an unusual adverse impact on current employees. *Evans* indicates that a holding of violation of Title VII is impossible when jurisdiction over the claim is lacking. Consequently, the union's argument on the court of appeals' holding of lack of jurisdiction would, if sustained, defeat the seniority order. Point II of the union's petition, attacking the seniority allowance for lack of a finding of a violation of Title VII, means that a violation was not established because there was no jurisdiction. The seniority order, without review of the settlement order, thus involves the question of whether the time limit was not complied with and was a jurisdictional requirement as held by the court of appeals. On this question, the seniority order might be reversed as to class members who had failed to comply with the Title VII time limit. This result might be held consistent with the union's contention that *Franks* and *Evans* require denial of competitive seniority to an employee who fails to establish a right to recover under Title VII. The settlement between the plaintiffs and TWA as to matters other than competitive seniority would not be affected. The parties to the litigation would be permitted to make a valid settlement regardless of the possible lack of jurisdiction over the claims settled.

Similarly the union's contention that the seniority allowance violates the collective bargaining agreement between the union and TWA (Cert. Pet. 9, 17, 20) can be reviewed by

consideration of only the seniority order. The benefits conferred by the settlement order do not violate the collective bargaining agreement.

This is even true of the issue of unlawful sex discrimination (not argued by the union) if the grant of certiorari in No. 78-1549 indicates the Court's interest in considering whether TWA's pre-1970 practice was unlawful sex discrimination under Title VII. The overall settlement order could be permitted to stand unreviewed and, in reviewing the seniority order, the court could consider whether there had been a violation of Title VII by TWA if, as the union argues, establishment of a violation is necessary to an allowance of competitive seniority under the *Franks* and *Evans* cases.

Unfair Effect on Parties if Review Not Limited to Seniority Order

The inclusion of the settlement approval order in certiorari review has the unfair effect on TWA, as well as the class members, of prolonging the efforts to dispose of this litigation by a reasonable compromise. In October 1970, shortly after the suit was begun, TWA abandoned the pregnancy practice complained of in the complaint. The claims of flight attendants previously terminated were compromised in a 1971 settlement which, approved by the district court, was set aside on appeal with certiorari denied (416 U. S. 993 (1974)). After an adverse summary judgment of unlawful sex discrimination in 1976, the court of appeals in 1978 affirmed the holding but held a large number of class members had failed to comply with a Title VII time limit for filing claims. While discussing settlement, the parties kept the disputed issues alive by certiorari petitions in this court in Nos. 78-1545 and 1549. In June 1979 the disputed issues were settled in the agreement approved by the district court in November 1979 and the court of appeals in June 1980.

The union's appeal from both the settlement and seniority orders in No. 80-951 has prevented the parties from proceeding with the settlement. It is ironical that the union's objection is to the grant of retroactive competitive seniority. The 1971

settlement was disapproved by the court of appeals on the converse of this issue: the 1971 settlement *did not* grant retroactive competitive seniority. *ALSSA* v. *American Airlines, Inc.*, 490 F. 2d 636 (7th Cir. 1973), cert. den. 416 U. S. 993 (1974). TWA has thus been unable since 1979 to end the litigation because of the inclusion of what, excluded in 1971, defeated the 1971 settlement. In both cases, the dispute over seniority does not involve TWA but the competition between current and re-employed flight attendants.

TWA should be permitted to get out of this litigation by the compromise which both lower courts have held to be reasonable and fair to the parties. This result can be readily achieved if this Court limits its review to the seniority order.

CONCLUSION

Limitation of review to the seniority order as requested in this motion will simplify the varied issues raised by the granted petitions and permit a more expeditious disposition of this protracted litigation. Such a limitation, which is very much in the interest of TWA and the class members, would not deprive current employees represented by the union of their right to protect their interest, which is only in the allowance of competitive seniority.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, *et al.*,

Plaintiffs,

vs.

TRANS WORLD AIRLINES, INC.,

Defendant.

No. 74 C 2063

ANNE B. ZIPES, *et al.*,

Plaintiffs,

vs.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO and TRANS WORLD AIRLINES, INC.,

Defendants.

ORDER APPROVING SETTLEMENT AND DISMISSING ACTIONS

The court has considered the proposed Settlement Agreement, as amended, for the compromise of these actions and has considered the written and oral presentations of the parties under Rule 23(e), F.R.C.P. The court finds that proper notice of the proposed settlement and the hearings thereon was given to the members of plaintiff class and Subclasses A and B; and

that no class member objected to the settlement. The court also finds that the settlement agreement is fair, reasonable, and adequate for the parties and Subclasses A and B.

Accordingly, it is ordered, that the Settlement Agreement, as amended, is approved and the actions are dismissed. The court finds, pursuant to Rule 54(b), F.R.C.P., that no just reason exists to delay enforcement of or appeal from this Order.

The court retains jurisdiction:

(a) to determine the total amount of seniority and credit for length of service (both accrued and retroactive) for re-employed class members as provided in Section V B of the Settlement Agreement as amended,

(b) to enforce the terms of the Settlement Agreement and the orders entered herein, including this Order,

(c) to adjudicate any disputes which may arise concerning the interpretation of any part of the Settlement Agreement, including matters relating to the claims of eligibility of class members, and

(d) to determine the amounts of attorneys' fees and reimbursement of costs and expenses which may be awarded to plaintiffs' lawyers and the representatives of the class.

ENTER:

/s/ Stanley J. Roszkowski
STANLEY J. ROSZKOWSKI
Judge
United States District Court

Dated November 8, 1979

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, *et al.*,

Plaintiffs,

v.

TRANS WORLD AIRLINES, INC.,

Defendant.

No. 74 C 2063

ANNE B. ZIPES, *et al.*,

Plaintiffs,

v.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, and TRANS WORLD AIRLINES, INC.,

Defendants.

ORDER AWARDING SENIORITY

The court having considered the evidence, testimony and briefs which have been submitted in connection with the issue of seniority, pursuant to Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) and Section V of the Settlement Agreement, as amended, and the court finding that full restoration of retroactive seniority will not have an unusual adverse impact upon currently employed flight attendants in a

manner which is not typical of other Title VII cases, it is ordered that each class member who is now employed as a TWA flight attendant or who will hereafter become employed as a flight attendant by TWA under the Settlement Agreement shall be credited with the amount of union ((occupational) seniority to which she was entitled on the date on which her employment was terminated, plus credit for such seniority for the "compensation period", as defined in the Settlement Agreement (at page 3), less the deductions provided therein (at p. 8), the terms of which are incorporated by reference and are adopted as part of this Order.

The court having approved the Settlement Agreement in a separate order, it is ordered that this case be, and is hereby, dismissed. The court finds, pursuant to Rule 54(b), F.R.C.P., that no just reason exists to delay enforcement of or appeal from this Order.

However, this court hereby retains jurisdiction:

(a) to enforce the terms of the Settlement Agreement and the orders entered herein, including this Order,

(b) to adjudicate any disputes which may arise concerning the interpretation of any part of the Settlement Agreement, including matters relating to the claims of any eligibility of class members, and

(d) to determine the amounts of attorneys' fees and reimbursement of costs and expenses which may be awarded to plaintiffs' lawyers and the representatives of the class.

ENTER:

/s/ Stanley J. Roszkowski
STANLEY J. ROSZKOWSKI
Judge
United States District Court

Dated Nov. 8, 1979